reaching the conclusion of validity of the patent in suit in this case.

Petitioner appears to rely on the first category, referred to above, for providing the alleged basis for granting the writ in this case. In so doing, the petitioner, without warrant or factual support, states that the Circuit Court of Appeals for the Seventh Circuit has applied an incorrect standard in holding valid the patent in suit, and infers like errors by the Court with respect to its decisions in all other patent cases during the period referred to—all of which is totally unjustified and without any support whatsoever in the record of the case.

In its petition, petitioner asserts as its sole ground for granting the writ the need for this Court's supervisory guidance for the Circuit Court of Appeals for the Seventh Circuit because, as the petitioner concludes, the asserted statistics* indicate that the Seventh Circuit has held valid 45.6% of the patents considered by it in the above-identified period, whereas the validity holdings in other Circuits are of a different percentage—some lower and one, the Fifth Circuit, higher.

In its effort to support this completely unfounded and unwarranted contention, petitioner makes the following erroneous statements. It asserts that the Court of Appeals is applying an erroneous standard of invention and requires the supervisory guidance of this Court for the reason that:

1. it has adopted ". . . an inconsistent and lower standard of non-obviousness than that adopted by other circuits . . .";

* Derived from Professor Kayton from an unofficial source outside the record of this case referred to only in the dismissed and undecided Petition for Certiorari in No. 1528 of the October 1970 term.

2. it has ". . . handed down decisions that indicate it just is not following this Court's edicts. . . .";
3. it ". . . has been inundated by patent infringement actions, regardless of convenience, and continues to hold valid patents that show but insignificant variations of prior art. . . ."; and
4. ". . . this Court owes the public a duty of supervision over such incredible decisions as those of the Seventh Circuit so that the public will know which way to turn when harassed by insignificant patents."

In addition, petitioner makes the completely erroneous inference that the petitioner speaks not alone but for the public as well. Thus, the petitioner is here making a completely unjustified and unsupported attack on the conduct of the Circuit Court of Appeals for the Seventh Circuit with respect to its handling of all patent cases, and is here urging upon this Court its presumptuous and unfounded assertions—knowing full well that it cannot support its charges and understanding that there is not one jot of evidence to in any way support the charges made.

Petitioner knows that it has no basis for contending (a) that the evidence and law in each and every case referred to as having been decided by the Seventh Circuit Court of Appeals did not in all respects support the findings and conclusions entered in each thereof; (b) that the number of cases decided for and against the validity of patents in the various judicial circuit does not and cannot support the conclusions asserted by petitioner; nor (c) that Professor Kayton's unofficial figures do not establish that the United States Court of Appeals for the Seventh Circuit ". . . has been inundated by patent infringement actions, regardless of convenience, and continues to hold valid patents that show but insignificant variations of prior art. . .".

It is submitted that this kind of irresponsible representation and condemnation of the entire judicial program with respect to patent cases of the Court of Appeals for the Seventh Circuit does not and cannot afford any ground whatsoever for granting the petition submitted in this case.

Petition Outside of Rule 19 of This Court.

Consideration of the record here will show that in this case there is no special or important reason for this Court exercising its judicial discretion with respect to the requested writ of certiorari. There is no appellate court decision here which is in conflict with another Court of Appeals on the same subject matter. Furthermore, there is no important, new question of federal law which should be settled by this Court. Finally, the Court of Appeals for the Seventh Circuit has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is true the petitioner contends there is need for supervisory guidance of this Court over the Court of Appeals for the Seventh Circuit in connection with the standards of patentability applicable to the validity issues in patent cases, but the facts of this case clearly establish that there is absolutely nothing here that supports this contention.

The arguments presented by petitioner do not show error on the part of the Circuit Court of Appeals for the Seventh Circuit in the application of the standard of patentability initiated by this Court in *Graham* v. *John Deere Co.*, *supra*, but, rather, the Court of Appeals meticulously followed the standard there pronounced. Here, petitioner merely objects to the finding of patent validity which resulted when the Circuit Court of Appeals for the Seventh Circuit applied the established standards of *Graham*, *supra*, to the

facts as found in this case. While petitioner vigorously asserts that the Court of Appeals applied an incorrect standard in determining the validity of the patent in suit, its position is based entirely upon alleged facts which are contrary to those found in the record here. Besides, petitioner does not at any time assert that the conduct of the Court of Appeals in this case warrants the granting of the writ, but, rather, that the need for this Court's supervision is found in the standards applied by the Court of Appeals for the Seventh Circuit in all patent cases.

The petitioner's argument is based essentially on a game of numbers or a comparison of percentages of cases decided for and against the validity of patents in the various Circuit Courts of Appeals throughout the United States, and on such basis contends that the Court of Appeals for the Seventh Circuit must have applied the wrong standards in the present case. The error of this argument, however, is apparent—as patentability of all patents is and must be decided on a case-by-case basis and not, as the petitioner would have it, on an average basis for all cases decided through the ten judicial circuits.

There is nothing before this Court that even remotely suggests that the Seventh Circuit Court of Appeals was not entirely correct in its decisions in all of its cases involving the validity of patents; but, more importantly, it is fundamental that whatever the decisions of this Court of Appeals in other cases may have been, such decisions can have no bearing whatsoever on the question as to whether the correct standard was applied in this case.

The present case must rest upon and be decided on its own merits. The correctness of the Court of Appeals decision must be determined on the facts which have been found to control the issues here presented. What may have been decided in other cases in this and other Circuits, in the last analysis can have no place here.

A review of the Seventh Circuit Court of Appeals decision in this case shows, without question, that far from applying an incorrect standard of patentability, the Circuit Court of Appeals followed precisely the rule laid down by this Court in *Graham* v. *John Deere Co., supra.* Reference to the decision of this Court* will show that the Court made the following statements when considering the question of the standard to be applied in adjudging patentability.

The Court first identified and described each of the three reference prior patents (pp. 4a, 5a). The statute 35 U. S. C. 103 was set out (p. 5a). The manner in which obviousness was to be judged and the analytical steps to be taken were quoted from this Court's decision in *Graham* (p. 6a). The criteria set forth in the quoted steps from *Graham* were then discussed with relation to the disclosures of the prior patents (pp. 6a-9a). The level of ordinary skill in the pertinent art was determined (p. 8a). The fact that the disclosures of the prior patents were in no way combinable to produce the invention so that non-obviousness was the logical conclusion to be drawn was set forth by the Court (p. 9a). The Court's decision ends with the statement that the invention fulfilled the non-obvious criteria of 35 U. S. C. 103 (p. 9a).

While petitioner ascribes to the Court of Appeals a decision under 35 U. S. C. 103 different from that of the Court of Customs and Patent Appeals it is apparent that the decisions of that Court and of the Court of Appeals are both in harmony with the decision of this Court in *Graham.* The Court of Customs and Patent Appeals in the *Application of Robert W. Bodley,* 426 F. 2d 390 at 394 quotes its own statement from *In re Rosselet,* 347 F. 2d 847, 52 CCPA 1533 (1965):

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* Particularly pages 5a to 9a, Appendix to Petition for Certiorari.

> "* * * it is our view that the test of obviousness is not express suggestion of the claimed invention in any or all of the references but rather what the references taken collectively would suggest to those of ordinary skill in the art * * *"

An examination of the Court of Appeals decision (pp. 6a-9a) shows: that the Steidinger patent differed from the prior art (p. 7a); that Steidinger's construction included a unique insert ply not found in any of the art (p. 8a); that if the prior art were to be combined, parts essential thereto would have to be discarded (p. 9a); and that even after being combined the art would lack capabilities displayed by the patent in suit (p. 9a).

From the detailed description of the prior art and patent in suit, it is apparent that the Court of Appeals properly decided the issue of non-obviousness in this case.

Relative to commercial success, Petitioner claims the decision by the Court of Appeals is contrary to the decision of this Court in *Thoger Gronberg Jungersen* v. *Ostby & Barton Company et al.*, 335 U. S. 560. It is respectfully submitted that *Jungersen* merely says that commercial success is no substitute for invention. The Court of Appeals' decision (p. 11a) as to the success of the invention meets the test set forth by this Court in *Goodyear Tire & Rubber Company, Inc. et al.* v. *Ray-O-Vac Company*, 321 U. S. 275 (1944) at 278 and 279.

SUMMARY AND CONCLUSION.

This petition merely presents a plea that this Court review the merits of a decision of the lower Court in a civil patent litigation having no interest beyond the parties directly involved. To bolster its petition, an allegation is made that the Seventh Circuit Court of Appeals has in several cases since January, 1966, not followed this Court's

decision in *Graham* v. *Deere*. The petition presents no compelling reason why certiorari should be granted. The petition should be denied.

Respectfully submitted,

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